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Regulatory reform has been a subject of frequent discussion in the last decade, especially in the context of presidential efforts to assert control over the rulemaking process. Presidents Nixon, Ford, Carter, and Reagan have all attempted to increase presidential authority over regulation. In particular, President Reagan has issued two executive orders that give the Office of Management and Budget (OMB) considerable power over the rulemaking activities of executive agencies.

In this article, we set forth our views on the role of presidential supervision in the regulatory process, with particular attention to the questions raised by the recent executive orders.

These executive orders address problems to which the American Bar Association (ABA) has spoken most recently in the Report of the Commission on Law and the Economy, *Federal Regulation: Roads to Reform.*[1] Recommendations 3 and 4 of the Commission were as follows:

> Recommendation 3: A statute should be enacted authorizing the President to direct certain regulatory agencies, both within and outside the

*This essay is a slightly revised version of a report of the Separation of Powers Committee of the Administrative Law Section of the American Bar Association. The authors would like to thank the other members of the committee, E. Donald Elliott and Peter Shane, for valuable help. In addition, a number of others—including particularly Ernest Gellhorn, Geoffrey P. Miller, Michael McConnell, Susan Rose-Ackerman, and Paul Verkuil—provided useful comments.

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[1]Presidential control of the regulatory process is discussed and approved in AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM (1979) [hereinafter cited as ROADS TO REFORM]. The analysis in this memorandum is, in the main, consistent with the views set forth in that earlier report. Both overlaps and deviations are described in the text.

executive branch, to consider or reconsider the issuance of critical regulations, within a specified period of time, and thereafter to direct such agencies to modify or reverse their decisions concerning such regulations. 'Critical' regulations should be defined as those the President finds to be of major significance both to the national interest and to the achievement of one or more statutory goals in addition to the goal primarily entrusted to the regulatory agency in question. Such a statute (1) should contain adequate subject matter limitations and procedural safeguards governing presidential exercises of this authority; (2) should not authorize intervention in licensing and rate-making cases and should confine the President to the appropriate exercise of the agency's statutory discretion upon the basic facts (as distinguished from the ultimate conclusions) determined by the agency; (3) should provide time for congressional reaction before presidential orders become effective; (4) should expire after a limited term of years, so that Congress could refuse to extend the authority if the President did not adequately take congressional reaction into account; and (5) should not change the standards applicable to agency actions upon judicial review.[2]

Recommendation 4: An Executive Order should direct federal agencies, before completing a major regulatory action, to prepare a regulatory analysis open to public comment and, when the President deems it appropriate, to conduct an inter-agency review under presidential auspices, as a basis for enabling the initiating agency to appraise the impact of the proposed regulatory action on the achievement of all relevant statutory goals, including but not limited to those entrusted to the initiating agency. If such an Executive Order applied only to executive branch agencies, and if experience with such a review process were favorable, the process should be extended, by means of an enabling statute if necessary, to agencies defined by present statutes as independent from the executive branch. Any such order or statute should provide that the adequacy of such a regulatory analysis would not present an independent basis for judicial review. This recommendation is limited to regulations of general applicability and does not extend to ratemaking or to licensing and other forms of adjudication.[3]

The Coordinating Group on Regulatory Reform came to believe that a statutory provision as formal as is suggested by Recommendation 3 was not desirable, and the President has not sought formally to displace agency authority for substantive decision (although reports of substantial leverage persevere, doubtless with reason). The following pages pick up the Commission's emphasis on the need for coordination by the President in cases of multiple jurisdiction or overarching statutory command, but generally treat the proper ambit of the executive orders as being to embody a general process for shaping agency policymaking, rather than a particularized process for displacing it—indeed, emphasizing that the delegated authority for lawmaking remains

[2] *Id.* at 2.
[3] *Id.* at 3.

where it was put by Congress, in the agencies, and is part of the "law" which the President is to execute faithfully.

I. "POLITICS" VS. "EXPERTISE": A PREFATORY NOTE

For a long period, debates over the administrative process have been influenced by competing judgments on the respective roles of "expertise" and "politics" in regulation. James Landis' model for administration was that of neutral experts, standing above the political fray, making decisions on the basis of an objective concern with the public interest.[4] Sometimes a different understanding prevails. Regulatory issues are often said to raise difficult questions of value on which reasonable people, or those with conflicting interests, may differ. In this view, there is no unitary public interest, and the relevant solutions must be based on "political" considerations rather than on the application of expertise. The dispute between these competing understandings helps to account for numerous more particular disagreements in administrative law.

The two understandings have important institutional implications. For believers in the value of expertise and neutral administration, it is important to insulate regulators from political processes, enabling them to inquire into issues of fact and value with some assurance that their deliberations will not be distorted by partisan concerns. For those who believe that regulatory issues present questions to be resolved "politically"—in accordance with (informed) constituent desires—decisionmaking power should be placed in the hands of those most accountable to the public. The recent measures taken by President Reagan suggest a belief in the latter position.

The debate between believers in regulation as application of expertise, and regulation as politics, reflects polar positions that, in our view, represent more a tension needing to be maintained than positions in themselves worthy of adoption. Technical expertise rightly plays an important role in regulatory decisions. It can, for example, set out a range of plausible options, indicating that that range is broader or narrower than might have been expected. On the other hand, judgments of value, subject uneasily or not at all to resolution on the basis of expertise, play a critical role in regulatory questions. The appropriate

[4] *See* J. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

trade-off between risks to human life and the social and economic dislocations created by environmental regulation—to use a familiar example—is not a decision that can be made solely on the basis of immersion into technical matters. Such trade-offs are rightly placed in the hands of officials who are politically accountable; and they are rightly subject to public scrutiny and review during the regulatory process. While it is properly insisted that such judgments be made within the constraints of law, it is misleading to understand the regulatory process as if it were entirely a matter of applying technical competence.

These considerations have important consequences for the regulatory process. They suggest, for example, that the power to make important trade-offs should be exercised in such a way as to foster accountability, and that accountability should be used as a check on the exercise of discretion. Procedural devices—including, for example, public explanation of the actual bases of decision—can be important in this regard. We take up this matter in more detail below.

One style of control, the ideal of "reasoned decisionmaking," often has been invoked by the federal courts in recent years,[5] and, in our view, it is an appropriate one. That ideal, as we understand it, has three central components. First, regulatory decisions should be based on a detailed inquiry into the disadvantages and advantages[6] of proposed courses of action. That inquiry will often be informed by application of technical expertise. Second, issues of value must be resolved in accordance with the governing statute. Sometimes that statute will require consideration of particular factors; sometimes it will exclude consideration of other factors; and sometimes it will indicate that some factors, although relevant, are of secondary importance. Third, to the extent that issues of value are to be resolved through an exercise of discretion by executive officials within the confines of statute, it is important to ensure that the relevant considerations—and the actual bases for decision—are explicitly identified and subject to public scrutiny and review.

With this general background, we turn to the issue of presidential control.

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[5]*See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 103 S. Ct. 2856 (1983).

[6]We use these terms rather than "costs" and "benefits," since the latter implicate the controversial criterion of willingness to pay. *See* Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1981); Posner, *Utilitarianism, Economics, and Legal Theory.*

II. PRESIDENTIAL CONTROL

A. Generally

Although all recent presidents have asserted authority over the regulatory process, President Reagan has taken the most dramatic steps with Executive Order 12,291 and, more recently, Executive Order 12,498. To understand the issues associated with increased presidential control, it is necessary to have some understanding of these executive orders.

Executive Order 12,291 imposes a number of requirements for executive agencies to follow in promulgating new regulations and reviewing existing ones. The most prominent among these states that, "to the extent permitted by law," regulatory action should not be taken unless the potential benefits outweigh the potential costs.[7] Other provisions are similarly designed to reduce the economic burdens of regulatory initiatives. To ensure adherence to its requirements, the Order accords to OMB supervisory power over the rulemaking process. Before promulgating "major rules," all agencies are required to prepare "draft and final 'regulatory impact analyses' " (RIA) discussing the costs and benefits of regulatory initiatives.[8] The RIA must be submitted for review and approval by OMB, with OMB enjoying apparently greater political authority at the draft stage. If a final RIA is not approved, the agency is explicitly authorized to go forward, merely explaining its differences with OMB; no such explicit statement is made that agencies may proceed without OMB approval at the draft RIA stage, which generally occurs well in advance of any public notice of the rulemaking. It is important, however, to understand that OMB acts in some respects as the President's personal staff, and that the process operates in a flexible and ad hoc manner.

Though enforcement may be problematic, the legal analysis of this issue has been relatively straightforward. The Justice Department memorandum accompanying promulgation of Executive Order 12,291 indicated that OMB has no authority to order an agency to undertake or not to undertake an initiative.[9] This conclusion is consistent with the language of the order itself. The ultimate power of

[7]Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 at 431–34 (1982).

[8]*Id.*

[9]*See* U.S. Department of Justice, Memorandum re Proposed Executive Order on Federal Regulation (Feb. 12, 1981), *reprinted in Role of the Office of Management and Budget*

decision thus remains in the agency head. But OMB can play a major role in determining the outcome of the regulatory process and, as a practical matter, it is unlikely that an agency will issue a regulation in the face of OMB disapproval. In any event, the exercise of supervisory power raises the danger, discussed below and perhaps realized in practice, of displacement of authority vested in the relevant agency head.

Executive Order 12,498 goes further. That Order establishes a "regulatory planning process" in order to assure the development and publication of an annual regulatory program.[10] The Order requires the head of every executive agency to submit to OMB a "draft regulatory program" that includes a description of "all significant regulatory actions of the agency, planned or underway," to be undertaken within the next year.[11] The Director of OMB is authorized to review the draft program for consistency with administration policy. After the reviewing process is complete, the agency must file a final regulatory plan, which is used to develop an Administration Regulatory Program that will be published in the Federal Register. The Order also provides that if the agency head proposes to take a significant regulatory action not included in or materially different from the final regulatory plan, he must submit the action to OMB for review. While this Order is a considerable extension of Executive Order 12,291, it reflects and builds upon principles adopted in the Carter Administration for public disclosure of annual regulatory agenda.

Both executive orders are directed at rulemaking undertaken pursuant to the informal procedures of the notice-and-comment provision of the Administrative Procedure Act,[12] or particular agency statutes such as the Occupational Safety and Health Act or the Clean Air Act. Executive Order 12,291 applies to such rulemaking, exempting formal rulemaking and other on-the-record proceedings. The limited scope of the order is based on a perception that where matters are to be decided in on-the-record proceedings, "political" considerations have been excluded, and the views of outsiders to the proceedings must be formally conveyed. Executive Order 12,498 is applicable to "significant regulatory activities," but it is clear from context that the order is designed to control the processes of rulemaking not required to be decided on the record.

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in Regulations: Hearings before the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*].

[10]Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (1985).

[11]*Id.*

[12]5 U.S.C. § 553 (1982).

The purposes of the two orders are not difficult to identify. Both are largely a response to the widespread perception that agency decision-making tends to be confused and uncoordinated, that the President is well-placed to consider the whole scheme of regulation rather than discrete units of it, and that administrators are not adequately accountable to the public in general, and its political executive-designate the President, in particular.[13] Beyond that lies the related perception that agency heads are, to an undesirable degree, the captives of their own staffs rather than politically powerful managers of agency business. Courts have created a number of techniques to attempt to respond to this problem, including review to ensure that the benefits of regulation are roughly commensurate with the costs.[14] The value of such techniques is, however, severely diminished by institutional limits of the courts, which are not well-equipped to calculate the costs and benefits of regulatory initiatives and are incapable of imposing a hierarchical or coordinative structure.[15] The orders represent an effort to deal with the general problem of uncoordinated and insufficiently accountable administrative decisions.

While the orders on their surface mark a major enhancement of presidential authority, a significant element of their attractiveness lies in their potential to expand the effective authority, accountability, and oversight capacity of the agency head. This potential is particularly strong for Executive Order 12,498. Requiring the development of an agency regulatory plan should have the same effect on the regulatory side as requiring agency presentation of a budget request does for fiscal planning. It will provide an annual opportunity for the agency head to focus on the work of her agency in a planning rather than a reactive mode, stressing broad vision and priority setting, and involving her early enough that one may expect her to have a significant impact on options considered. Fewer staff deals will have been cut. The requirement of early disclosure of plans—through ventilation of alternatives (in the case of Executive Order 12,291) and annual statement of the regulatory plan (in the case of Executive Order 12,498)—is thus a means of ensuring that regulatory policy is set by agency heads rather than staffs. In this respect, the two orders may be understood, not only as efforts to enhance presidential or OMB power

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[13]*See, e.g.*, J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 166 (1975).

[14]*See, e.g.*, Aqua Slide N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831 (5th Cir. 1978).

[15]*See* Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978).

as against agencies, but also as a means of enhancing the agency head's effective control over her staff.

Finally, the orders embody a perception that the principal defect in administrative regulation is that it has been unduly intrusive and imposed substantial costs without accompanying benefits.[16] This perception is of course highly controversial, and we venture no comment on it here.

B. The Need for a Presidential Role

Time has not undermined the ABA's conclusion in *Roads to Reform* that greater presidential control over the regulatory process is desirable. The growing professional consensus, reflected in that study, has been confirmed by subsequent analyses stressing the need to reconsider the way we conceptualize government in "the administrative state."[17] The experience under President Carter's Executive Order 12,044, as well as Executive Order 12,291, is of course relevant to these projections.[18]

Several features of that experience seem to have increased the benefits and tended to control the dangers of the supervisory process. OMB has cooperated with a continuing (and desirable) process of aggressive congressional oversight. No major scandals have emerged. In addition, OMB has taken steps to protect against contacts with private groups.[19] On the other hand, some reports have pointed to disturbing examples of use of OMB authority to distort the regulatory process. According to these reports, OMB has had private communications with powerful private groups and used such communications as a basis for displacing discretionary authority delegated to agencies—and

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[16]*See First Concurrent Resolution on the Budget: FY82, Vol. II: Hearings on S. 251–5*, 97th Cong., 1st Sess. (1981) (agency rules designated for postponement or review, President's Task Force on Regulatory Relief).

[17]*See, e.g.*, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235 (1981); Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125; Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982); J. MASHAW, BUREAUCRATIC JUSTICE: ADMINISTRATIVE LAW FROM AN INTERNAL PERSPECTIVE (1983).

[18]Some reason for caution is afforded by G. EADS, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA (1982), [hereinafter cited as G. EADS] which suggests that the benefits of the executive order process have been lower, and the costs higher, than might at first appear.

[19]*See Hearings*, *supra* note 9, at 76 *et seq.*

[20]*See* J. LASH, A SEASON OF SPOILS (1984); Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of EPA Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984). *See also*, G. EADS, *supra* note 18.

none of this has been disclosed to the public.[20] Such charges are denied by OMB.[21]

It is too soon to venture a final judgment on the performance of OMB and the relevant agencies under Executive Order 12,291 and, even more obviously, Executive Order 12,498. The necessary studies have only begun to appear; considerable work remains to be done. Moreover, experience under the two orders continues, and that experience, especially now that some of the initial difficulties have been worked out, will be of considerable importance for purposes of evaluating the program. The behavior of the executive branch is properly subject to a continuing process of academic and congressional scrutiny.

Regardless of how the process of implementation has operated thus far, there remains a powerful theoretical case, described in detail in *Roads to Reform*, for the view that greater presidential control over the regulatory process is desirable.[22] We summarize the three basic reasons for this conclusion here. All of those reasons grow out of the concerns that led the framers of the Constitution to create a unitary executive, a decision discussed in more detail below.

First, the President is in a good position to centralize and coordinate the regulatory process. This task has become increasingly important with the proliferation of administrative agencies, whose responsibilities often overlap with one another. Over a dozen regulatory agencies, for example, are now entrusted with authority over matters relating to energy policy. The President is the only "constitutional officer charged with taking care that a 'mass of legislation' be executed."[23] Some sort of coordinating role on the part of the President is indispensable, especially in light of the considerable discretion with which executive officials are often entrusted. As Judge Friendly has explained, "Each agency has a natural devotion to its primary purpose . . . no matter how many statutes . . . say that it shall 'consider' other interests as well. Someone in Government, and in the short run that someone can only

[21]*See, e.g.*, Wash. Post, Sept. 28, 1983, at A8, col. 4; N.Y. Times, Sept. 28, 1983, at A1, col. 1; *cf.* GENERAL ACCOUNTING OFFICE, COST-BENEFIT ANALYSIS CAN BE USEFUL IN ASSESSING ENVIRONMENT REGULATIONS, DESPITE LIMITATIONS (1984) (suggesting that review process has improved some rules).

[22]*See* Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L. J. 1395 (1975); Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L. J. 451 (1979); ROADS TO REFORM, *supra* note 1.

[23]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C. J., dissenting).

be the President, must have power to make the agencies work together. . . ."[24]

Second, the President is electorally accountable. Equally important, he is the only official in government with a national constituency. These characteristics make him uniquely well-situated to design regulatory policy in a way that is responsive to the interests of the public as a whole. Agency officials, by contrast, are only indirectly accountable. They may also be subject to more parochial pressures. For these reasons, a supervisory role by the President should help ensure that discretionary decisions by regulatory agencies are responsive to the public generally.

Third, the President, by virtue of his accountability and capacity for centralization, is able to energize and direct regulatory policy in a way that would be impossible if that policy were to be set exclusively by administrative officials. These considerations are especially important when there is a national consensus that regulatory policy should be moved in particular directions.

It is a significant step from these considerations to the conclusion that presidential advisors, like those in OMB, should be given the power to supervise and coordinate the regulatory process. A principal difficulty here is that there is not an identity between the President and officials in OMB. The delegation of supervisory power to OMB over the rulemaking activities of agencies may serve, not to promote accountability, but instead to remove authority from agency heads and to confer power on staff members in OMB—thus sacrificing accountability and perhaps skewing the process against desirable government regulation. The problem may be aggravated by the fact that under the current scheme, there is no workable appeal to the President, as there was when the Vice-President's Task Force played a supervisory role in the early stages of the process under Executive Order 12,291.

There are several responses to these concerns—responses that, in our view, justify approval of the supervisory role set forth in the two executive orders. First, the case for supervision rests largely on the need for a centralizing and coordinating role. It may be that OMB authority will not increase accountability, but at least with appropriate safeguards such authority will not diminish accountability, and it is nonetheless desirable on independent grounds. Second, the recent executive orders should, for reasons discussed above, serve to increase the authority of agency heads and to decrease the power of agency staffs. That effort should itself promote accountability, quite apart

[24] *See* ROADS TO REFORM, *supra* note 1, at 163 (separate statement of Judge Henry J. Friendly, concurring in part with the Commission's recommendations).

from the issue of whether OMB or the relevant agency is more subject to presidential control. Finally, the relative proximity of those in OMB—their institutional position close to the President—may justify the conclusion that they are, in a special sense, his agents for purposes of supervising the regulatory process.

OMB's role does pose substantial risks. That role will, for example, strain the capacities of OMB staff and administrators. The officials at OMB may not have the necessary technical expertise to engage in the supervisory role, and, most important, their involvement may further attenuate the link between the final regulation and the rulemaking "record." But the answer to any such problem rests, we think, in a proper appreciation of these dangers by the relevant officials and in continuing efforts to obtain the information necessary to undertake supervision. In this connection, perhaps the best analogy to the role of OMB under the executive orders is the role suggested for the courts by Judge Leventhal: that of ensuring that agencies have taken a "hard look" at the relevant factors and that the decisions reflect a reasonable accommodation of the conflicting interests. In many respects, politically accountable decisionmakers have advantages over the courts in performing that task.

Moreover, the authority to make the ultimate decision rests where Congress has placed it—in the relevant agency. This understanding stems from the notion, set out in *Myers v. United States*,[25] that the President has the authority to discharge executive officials, but at least in some cases, no power to make the ultimate decision (except insofar as the threat of discharge amounts to such power). Under this view, the President's remedy for conduct of which he disapproves is the politically costly one of removal. Short of that, his authority—and even more obviously, that of OMB—is consultative and supervisory. Recognition of the agency as the primary decisionmaker should operate as a substantial safeguard against the risks created by lack of information. And the understanding that such an allocation is lawfully required should operate as an important constraint on the operation of the supervisory process.

There is in addition the familiar danger that the supervisory role will carry with it political biases that diminish rather than increase the likelihood of sound administration, endangering the ideal of reasoned decisionmaking.[26] The danger is perhaps made more acute by virtue of the vesting of supervisory authority in OMB, whose own institutional

[25]272 U.S. 52, 135 (1926) [hereinafter cited as *Myers*].

[26]*See* ROADS TO REFORM, *supra* note 1, at 155–161 (separate statement of William Coleman, Jr.). For the view that these dangers have been realized in practice, *see* note 20 *supra*.

mission—as an agency concerned largely with costs, on the budgetary and regulatory sides—may lead to an undue anti-regulatory bias. Deregulation, for example, is often a good idea, but in many contexts there remains a need for substantial government intrusion in the private marketplace. A danger raised by the recent executive orders is that a concern for the costs of regulation, which are more readily monetized than the benefits, will be permitted to defeat implementation of governing statutes.

While these are legitimate concerns, we do not believe that they are sufficient to justify disapproval of the current initiatives. The countervailing considerations are too strong to outweigh this risk, which, it is hoped, will be diminished by two important constraints. The first is that the supervisory role must be exercised in accordance with statute—a fact expressly recognized in the two executive orders and vindicated by judicial review. The second countervailing consideration, as noted, is that the ultimate power of decision remains vested in the relevant agency.

In light of these considerations, several measures should be undertaken to diminish the dangers and to increase the benefits of the regulatory process under the two executive orders.

First, OMB should institute a procedure to ensure public disclosure of (1) any factual materials it introduces into a rulemaking proceeding and (2) all substantive communications with persons not associated with the executive branch whenever those communications appear pointed at particular issues it is considering. Factual materials introduced by OMB stand on the same footing as factual materials introduced by the agency itself; both belong as part of the rulemaking file, at least after the notice of proposed rulemaking has been published in the Federal Register. (Before publication, no such requirements attach.) This basic principle should apply to "conduit" communications—materials received by OMB from private sources and communicated, with or without attribution, to the relevant agency. As noted above, OMB has taken steps to ensure that the process of receiving information from private organizations will be carefully controlled. But it has been sharply disputed whether those controls have been adhered to in practice. We believe that the measures now in place should be supplemented by a more formal procedure. Such a procedure might build on the similar provisions of the Clean Air Act, which have served as a benefit to reviewing courts and to the public as a whole and which have not, in general, been an undue constraint on executive decisionmaking.[27] Formal procedures of this sort would serve as an important

[27] *See* 42 U.S.C. § 7607. In conformance with the original recommendations in ROADS TO REFORM, however, we do not advocate adoption of that part of the Clean Air Act that

safeguard against the appearance or reality of distortions of the regulatory process and circumvention of ordinary regulatory requirements. These general conclusions are in accord with Recommendation 80–6 of the Administrative Conference of the United States, which set out similar disclosure requirements.

Second, agency drafts prepared under the two executive orders should, as a general rule, be made available on request to relevant congressional committees after the process of decision has run its course. During the process of decision, those drafts should be presumed confidential. But after rulemaking activity has ceased, disclosure of such drafts should allay public concerns about the role of OMB and would provide valuable information to Congress about the nature of OMB's supervisory role. There are, to be sure, the familiar dangers associated with disclosure requirements: the decisionmaking process may be chilled and candor may be less likely. In this context, however, we believe that those dangers are outweighed by the benefits of disclosure. We also believe that post-activity disclosure is a reasonable accommodation of the conflicting interests. It is also one which conforms to the best of existing practice under the Freedom of Information Act and Executive Order 12,291. Disclosure should be understood as a matter of presidential prerogative, however, and not as an acknowledgement that the principle of executive privilege fails to protect the process of decision under the two orders. In order to reach this conclusion, it is not necessary to make any general statement about the reach of the controversial principle of executive privilege.

Third, OMB intervention should be limited to those cases in which it is called for by the rationale underlying increased presidential control. Those cases in turn involve two principal contexts. The first involves the need for coordination and centralization in the regulatory process; the second involves the need to communicate the views of the President when important regulatory issues are at stake. Intervention in the general run of cases should be avoided. In both contexts, intervention should be undertaken subject to the understandings reflected above: it must be within the constraints of the governing statute and of the delegation of primary decisionmaking power to the agency. Limiting intervention to such cases should emphasize that OMB's role is not to duplicate the agency's work, or to act as a *de novo* decisionmaker on issues of policy, but to bring a wider perspective to bear on decisions in settings that transcend an agency's more focused responsibilities.

Finally, a procedure should be reinstituted to allow for mediation by

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requires disclosure of all interagency communications in the rulemaking file. For general discussion, *see* Verkuil, *supra* note 22.

the President in cases of disagreement between the agency and OMB. Such mediation, which existed in the early period under Executive Order 12,291, would be designed to stress that OMB acts as a surrogate for the President and that its word is not final. A procedure of this sort should be used only in unusual circumstances, however, and it should be instituted with the understanding that even the President has no authority to displace decisions statutorily delegated to subordinate officials in the executive branch.

C. The Nature and Limits of the Budget Analogy

Executive Orders 12,291 and 12,498 are based in part on an analogy to the role of OMB in the development of the budget. The budgetary process is now superintended by that office, a task undertaken because of a recognition, first by the President and later by Congress itself, that budgetary matters should be resolved by an organization that is both subject to close presidential control and able to coordinate administration proposals into a consistent and coherent whole. It is now generally agreed that the centralizing role of OMB is a highly desirable feature of the budgetary process.

The historical development of the budgetary process is, we believe, of considerable importance in assessing the recent executive orders. Initially, of course, budget matters were handled between agency and Congress, without presidential intervention; indeed, the Treasury Department and the appropriations function were established in ways that, in comparison to other executive departments and activities, excluded the President. The expansion of American government at the beginning of this century first led President Taft to assert as an executive matter an interest in coordinating agency budgetary submissions. The President's role was given statutory form in 1921, and quickly came to be accepted as a natural and desirable aspect of executive function.

When, in the wake of *Humphrey's Executor v. United States*,[28] the FTC asserted that it need not participate in the budgetary process (as it was an independent commission), Congress as quickly rejected the assertion and subjected the FTC to that process. While a few agencies now are directed to send to Congress the budgetary submissions they provide OMB, agency participation in the OMB process is virtually universal. For both agency head and President it provides an annual review, from a fiscal perspective, of the government's overall priorities and plans; the benefits of the review are widely acknowledged.

[28]295 U.S. 602 (1935).

The recent presidential initiatives may be understood as efforts to apply the budgetary model to the regulatory context, and there are indeed parallels between the two settings. In both areas, a central task is to ensure that potentially conflicting and inconsistent proposals are coordinated. In both settings, it is desirable to ensure that the President, or those closest to him, are able to supervise the decisionmaking process. And in both settings, the budgetary model is a device for increasing (and exposing to public view) control by agency heads over agency decisionmaking. The process will ensure early injection of the people in the agency who are most politically accountable, through their appointment and participation in oversight activities.

There are, however, four important differences that make the analogy an imperfect one. First, the President's role in the budgetary process is not a final one. Congress must enact the appropriations statutes. To be sure, OMB insists that agency submissions to it are not an appropriate part of the process of legislative supervision. But the fact is that neither OMB nor an agency head who may share OMB's view of appropriate priorities within his/her agency can effectively prevent Congress from finding out about those submissions, or indeed the cutting or reallocation that may have gone on within the agency itself. In the regulatory context, by contrast, political (that is congressional) review of the President's oversight decisions is not a matter of course.

Second, in the budget context, statutory authority for coordination is granted to the President by the Budget and Accounting Act.[29] In the regulatory context, by contrast, it is the agency head who enjoys authority under governing statutes. This distinction, as discussed below, has important consequences for the respective roles of the President, OMB, and the agency in the regulatory process.

Third, and relatedly, regulatory decisions must be made pursuant to standards set down in a statute. When OMB and an agency are deciding on a regulatory proposal, their decision must be consistent with statutory requirements. By contrast, when OMB and an agency are deciding on a budgetary request, there are no statutory standards to govern that decision; the statutory constraints are imposed after rather than before the executive branch proposal.

The final difference between the regulatory and budgetary contexts is that there is, in the latter context, an ideal of "reasoned decisionmaking" that is subject to judicial enforcement. That ideal—which, for reasons stated above, we endorse—makes the rulemaking process less overtly "political" than the budgetary process. Spending decisions are

[29]31 U.S.C. §§ 501–02 (1982).

not easily subjected to the constraints imposed on regulation, and the ideal of reasoned decisionmaking is for that reason less easily applied there than in the regulatory context.

All of these differences have important consequences for the rulemaking-budget parallel, and for the role of OMB in the rulemaking process. First, there are limits to the presidential power to make the ultimate decision. That power remains vested in the relevant agency. Second, OMB must exercise its supervisory power in ways consistent with the governing statute. Some statutes, for example, forbid consideration of costs, or require that costs be considered in a particular manner; agencies have no authority to ignore such instructions on the ground that they are inconsistent with the presidential program. The risks of presidential lawmaking—or, in other terms, of presidential refusal to undertake activities contemplated by Congress—are pointed up by the impoundment controversy. In the context of the recent executive orders, the parallel to the impoundment controversy is quite precise. It will be recalled that the impoundment problem arose from an assertion of presidential power not to expend funds appropriated by Congress.[30] In the regulatory context, the danger involves refusal by the executive branch to undertake activities that Congress sought to require in the governing statute.

The executive branch has no general authority to decline to enforce statutes of which it disapproves.[31] To say this is not to deny the existence of executive power to allocate scarce prosecutorial resources to those problems that seem most pressing.[32] But the risk created by the recent executive orders is of a different character. That risk, in short, is that the orders will be used to defeat implementation of statutes that do not accord with the policy preferences of the incumbent administration.[33] The solution lies, we believe, in a number of devices: congressional oversight; judicial review; public disclosure of important features of the regulatory process; and perhaps most important, an understanding on the part of those entrusted with administration of relevant orders of the limitations of their role.

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[30]*See* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW: CASES AND COMMENTS 107 (7th ed. 1979).

[31]*See* Sunstein, *supra* note 4; Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 103 S. Ct. 2856, 2875 n.* (1983) (Rehnquist, J. concurring in part and dissenting in part) ("Of course, a new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions"). To say this is not to resolve the question of when judicial review of agency inaction is available, a still unsettled question. *See* Heckler v. Chaney, 105 S. Ct. 1649 (1985). *See* Sunstein, *Reviewing Agency in Action After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

[32]Note that Congress sometimes enacts more law than it wants enforced. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW § 23.1 (2d ed. 1977).

[33]*See* G. EADS, *supra* note 18.

The final difference between the budgetary process and that involving rulemaking is that the latter process must be undertaken in a less "political" manner than the budgetary process. The various constraints imposed by the notion of reasoned decisionmaking do not apply when the President is developing a budget.

The constraints, referred to above, that characterize the budgetary process itself are now well-understood and deeply rooted in American government, and they suggest important lessons for the regulatory process. OMB has been structured so as to subdue "constituency politics;" examiners attempt to enforce presidential directives, but avoid contact with interested private groups; a measure of discipline is created by exposure of the President's budget to congressional examination and enactment; there is a distinction, accepted by all concerned, between permissible general underfunding to reflect national priorities and impoundment of particular funds to reflect presidential disagreement with lawmaking decisions; and benefits have resulted from the publicity of agency dealings with OMB at various stages of the budgetary process.

D. The Question of Presidential Authority

Both of the recent executive orders raise the question whether and to what extent the President may supervise decisionmaking by subordinate officials within the executive branch. The text of Article II is notoriously silent about the dimensions of the "executive power," *all* of which is vested in a President, but the fundamental character of the choice for a unitary executive requires his involvement, to some degree, in all executive issues.[34] One little noticed phrase of Article II, Section 2, Clause 1, of the Constitution appears to speak directly to the President's right to inform himself about administrative issues. That phrase empowers him to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[35] At a minimum, the phrase tells us that there are to be agencies, with heads, who will have duties; and that the President can demand reports. It is not hard to infer that these reports may be demanded preliminary to action, and may be in a form that the President can specify—for example, an RIA or regulatory agenda. The directory authority is more difficult; no significant judicial construction of this particular phrase has occured. In general, Supreme Court decisions furnish imperfect guidance on the question of supervisory power. What guid-

[34]*See* Myers, *supra* note 25, at 135.
[35]U.S. CONST. art. II, § 2.

ance there is derives primarily from two early cases dealing with the problem of presidential power to remove executive officials.

The first is the celebrated case of *Myers v. United States*.[36] Myers was a postmaster who had been removed from office by the Postmaster General at the direction of the President. The relevant statute barred removal except with the advice and consent of the Senate; it had not been obtained. The Supreme Court, in a lengthy opinion by Chief Justice (and former President) Taft, concluded that the statutory restriction on the removal power was unconstitutional. This conclusion rested in large part upon the grant of executive power to the President in Article II.[37] According to the Court, the vesting of executive power in the President revealed "an intention to create a strong Executive" in which the executive power was conferred on "one person."[38] A requirement that the President obtain congressional authorization for removal of executive officers would impede unity and coordination in administration and thus reduce the likelihood of prompt and effective action.[39] This result, according to the Court, would have adverse consequences against which the framers had sought to guard by making provision for a unitary executive.

The central premise of *Myers* is that the Constitution creates a unitary executive branch. That premise is well-supported by the history and background of Article II.[40] To authorize Congress to insulate subordinate officials from executive control would be inconsistent with the premise; it would enable Congress to create a set of agents for which there is no constitutional authorization. The problem in *Myers* itself was especially acute, for there Congress had given itself a veto power in the removal process.

At the same time, the *Myers* Court added two provisos to this understanding of Article II. First, it suggested that it was possible that with respect to some duties "peculiarly and specifically committed to the discretion of a particular officer," there would be a question "whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."[41] Second, the Court noted that

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[36]272 U.S. 52 (1926).

[37]U.S. CONST. art. II.

[38]*Myers, supra* note 25, at 116.

[39]*Id.* at 134.

[40]*See* Strauss, *supra* note 17.

[41]*See Myers, supra* note 25, at 135. The question was one on which early attorneys general vacillated. *See* 1 Op. Att'y Gen. 624 (1823); 2 Op. Att'y Gen. 480 (1831); 18 Op. Att'y Gen. 31 (1884). In Kendall v. United States, 37 U.S. 524 (1838), the Court had given an earlier indication that the answer to the question ran against presidential revisory power.

the President "can not in a particular case properly influence or control" decisions of a "quasi-judicial character imposed on executive officers and members of executive tribunals."[42]

The second case, *Humphrey's Executor v. United States*,[43] involved the legality of President Roosevelt's attempt to remove Humphrey from his position as a member of the Federal Trade Commission. The relevant provisions of the FTC Act allowed removal only for "inefficiency, neglect of duty, or malfeasance in office."[44] Citing *Myers*, the government argued that this provision was unconstitutional insofar as it restricted the President's power to remove an executive officer "at will." The Court rejected the argument. The basis for its conclusion was the nature of the duties performed by Humphrey—duties quite different from those of the postmaster, who was "restricted to the performance of executive functions."[45] Humphrey, exercising what the Court characterized as quasi-judicial and quasi-legislative duties,[46] did not act in an executive department or exert executive power. The holding in *Myers*, according to the Court, was inapplicable to a commission "wholly disconnected from the executive department," which was "an agency of the legislative and judicial departments."[47]

The language just quoted is, of course, extremely problematic in its formalism.[48] The suggestion that agencies must be "in" one or another department is not a necessary one, and is usually made (as here) in the context of excluding an agency from a particular one of the three branches rather than locating it in another. For its immediate purposes, the Court did not have to say whether the FTC was "in" the judiciary or "in" the legislature. Subsequent Supreme Court opinions, notably *Buckley v. Valeo*,[49] have suggested that the structural issue is one of relationship rather than place: because the Federal Election Commission exercised certain law-implementing responsibilities, it had to have the constitutional relationship with the President that departments do.[50] Of course, this understanding of *Humphrey's*—that it did not deny *some* presidential relationship with the FTC, but held only

[42]*Myers*, *supra* note 25, at 135.
[43]295 U.S. 602 (1935).
[44]*Id.* at 623.
[45]*Id.* at 627.
[46]*Id.* at 628.
[47]*Id.* at 630.
[48]*See generally* Strauss, *supra* note 17.
[49]424 U.S. 1 (1976).
[50]For example, presidential appointment of heads; congressional involvement in appointment limited to confirming presidential choice or assigning appointment to presidentially appointed figures; and, one may add, the obligation to respond to presidential demands for "Opinions, in writing."

that Congress could constitutionally regulate that relationship to the extent of making Commissioners persons not dischargeable at will—merely reopens the central questions: What are the President's constitutional powers to control and supervise administrative officials, and to what extent can they be shaped by congressional judgment?

In the day-to-day workings of the executive branch, the power to control and supervise has two components. The first, procedural in character, is the authority to consult with and demand answers from the relevant official. The President and subordinate officials in the White House frequently exercise such authority in attempting to coordinate and oversee the operation of the executive branch.[51] Their authority to do so is unquestionable, given the "Opinions, in writing" clause of Article II. As remarked above, that authority comfortably extends to all heads of government agencies exercising substantial law-implementing authority; any other conclusion would deny the proposition about a unitary executive that is the most central judgment made about the presidency in the constitutional scheme. The President therefore has the constitutional power to require agency officials to prepare cost-benefit analyses, to develop regulatory agendas, to file environmental reports, or to explain the reasons behind proposed courses of action.

The question of substantive supervisory authority is more complex. The difficulties arising from the tension between the view of President as decider (the agencies as delegates of power that is fundamentally his, and so his to exercise) and the view of President as mere congressional lackey (lacking any substantive authority save what Congress chooses to confer on him) are well known[52] and underlay the ABA's limited endorsement of presidential revisory jurisdiction in Recommendation 3 of the Commission on Law and the Economy Report, quoted above.[53] The tension exists even in those settings in which the President's power to remove an official who does not do his bidding is unconstrained. The political reality is that he will not always be able to afford the political cost of the removal, or to persuade the Senate easily to confirm the official who docilely *will* do his bidding. Indeed, as noted, the Court suggested in *Myers* that although the removal power cannot be restricted, there may be constraints on the President's authority to displace decisionmaking authority vested in at least some kinds of officials

[51]For an example of such control, *see* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

[52]*See generally* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 80–81 (4th rev. ed. 1957).

[53]*See supra* note 1, and accompanying text.

"within" the executive branch.[54] This position derives considerable support from historical understandings[55] as well as the text of Article II. The consequence is that the President is not authorized either to make particular decisions statutorily vested in at least some subordinate officials, or to direct those officials to make particular decisions—except insofar as the prospect of removal operates as such a direction. If the President wishes particular decisions to be made, his recourse is to discharge the relevant official and to appoint a new one who shares his inclinations.[56]

We believe that these considerations support the facial legality of Executive Order 12,291. Under that Order, OMB is given supervisory authority over the rulemaking functions of executive agencies. That supervisory authority consists of the power to require statements about the costs and benefits of proposed rules and to review and comment on those statements. Such authority fits well within the presidential power recognized in *Myers*. Moreover, ultimate power to decide rests with the relevant agency. To be sure, the order does require agency heads—"to the extent permitted by law"—to act on the basis of considerations of cost and benefit.[57] That requirement amounts in some degree to a displacement of decisionmaking authority. But in view of the breadth of agency discretion in deciding on costs and benefits, and in making the ultimate trade-off, there is, in our view, no serious question about the facial legality of the order. This conclusion is buttressed by the various disclaimers in the order of any authority to displace delegated decisionmaking power.[58]

The same basic considerations apply to the facial legality of Executive Order 12,498. That order gives OMB a similar supervisory role

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[54]"Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." *Myers, supra* note 25, at 135. The Court said, however, that even in such cases the removal power remains intact.

[55]*See* Strauss, *supra* note 17.

[56]It might seem incongruous to allow unlimited removal power and at the same time to permit restrictions on substantive supervisory power but, as a matter of logic, there is no real anomaly. There are political constraints on the exercise of removal power; as a result, the President will exercise that power only in comparatively unusual circumstances. Moreover, a successor can be appointed only with the advice and consent of the Senate. For this reason, the supposedly greater power of removal need not carry with it the supposedly lesser power to dictate decisions.

[57]Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 at 431–34 (1982).

[58]*See* Strauss, *supra* note 17; Shane, *supra* note 17.

over the development of annual regulatory programs. But the ultimate decisionmaking authority remains vested in the agency head. Serious legal questions might be raised if OMB prohibited the agency head from issuing regulations not included in the final annual program that could not have been foreseen at the time that program was completed. Not enough is yet known about OMB administration of the new executive order to say whether it will be used to direct agencies not to act (a good deal of political persuasion is inherent in the exercise, we suppose, and an understood element of administration). Textual discussions of the new executive order produced by OMB suggest not,[59] but a flow chart emanating from OMB bears the strong suggestion that it expects to issue formal clearances without which agencies will not be permitted to act. The distinction between activating a political process for agenda and priority setting, and taking over an agency's ultimate authority, is a subtle one, yet one wants assurance that it will be observed.

Both executive orders thus raise significant dangers of overextension, dangers against which it is important to guard in the implementation process. Those dangers, as suggested above, fall in two principal categories. The first, for which the impoundment controversy is the best analogue, involves refusal to undertake regulatory activities in the face of a congressional judgment that regulation is desirable at least if certain findings are or are not made and supported.[60] The second involves displacement of the discretionary authority vested in the relevant agency by Congress. The solution to these dangers lies, we believe, in the various understandings and mechanisms described earlier in this essay.[61]

III. PRESIDENTIAL CONTROL AND THE "INDEPENDENT" AGENCIES

Presidents Carter and Reagan did not attempt to apply their executive orders to the so-called "independent" agencies. This decision was based largely on fear of the congressional reaction to any such effort rather than on a judgment that the President lacked the necessary constitutional power. President Reagan instead asked for voluntary

[59]Those discussions tend to stress unforeseen or unforeseeable issues that arise after an agenda has been agreed upon, rather than how disagreements over predictable issues will be resolved. A willingness to permit regulation in the former circumstances, while desirable, does not speak to the latter.

[60]*See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co., 103 S. Ct. 2856 (1983).

[61]*See supra* notes 24–29, and accompanying text.

compliance, a request that was generally rejected.[62] In our view, the President has the power to apply both executive orders to the "independent" agencies. We also believe that he should exercise that power.

The American Bar Association reached analogous though not identical conclusions at the time of the *Roads to Reform* report. Recommendation 4, the relevant proposal for present purposes, concluded that if experience under an initial executive order applicable only to the executive agencies were favorable, the process should be extended, "by means of an enabling statute if necessary, to . . . agencies defined by their enabling statutes as independent from the executive branch."[63] The text accompanying the recommendation states: "The Carter Order, as originally proposed, would have imposed its discipline on independent agencies as well as executive branch agencies. The final Order, however, leaves the 'independent' agencies untouched because many of them objected on legal and policy grounds. *A majority of the Commission regrets this omission.*"[64] (emphasis added). It is time to recognize that considerations of law and policy point in favor of and not against extensions of the executive orders to the independent agencies—subject, of course, to the various limitations on OMB authority recognized above.

Humphrey's Executor recognizes Congress' considerable authority to structure the ways in which the laws it passes are administered, including statutory creation of agencies protected from presidential removal without cause and somewhat remote from presidential direction. The law that delegates authority to an independent regulatory commission, like the law that places final decision in the hands of cabinet officials, is constitutional, and thus part of the body of law to the faithful execution of which the President is obliged to see. Yet, as *Buckley v. Valeo* has since underscored, Congress cannot make an agency responsible for law-administration so remote from the President as to defeat the authorities that the President has been granted by Article II. Thus, to say that the President cannot dictate outcomes is not to resolve the question whether the President can impose requirements that are procedural in character—as, for example, by requiring consultation or the preparation of particular documents, such as cost-benefit statements. We believe that the President has the authority to apply both executive orders to the independent agencies, and that he should exercise that authority.

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[62] *See Hearings*, *supra* note 9.
[63] ROADS TO REFORM, *supra* note 1, at 85.
[64] *Id.*

While broad dicta in *Humphrey's Executor* suggest that Congress can make the immunity of officials from presidential direction almost total, as by employing the independent regulatory commission device,[65] no such question was presented in the case and those dicta have come under considerable question. There are several reasons we do not believe the case would be read that broadly today. The first is that suggested by *Buckley*, read in conjunction with the "Opinions, in writing" language of Article II; we see no self-evident way of separating the appointments power from other aspects of Article II, and the same line of reasoning shows the authority to require opinions to be central to the President's unitary role. Second, in the case itself, the terms of the restriction on removal power—which permit discharge for "inefficiency, neglect of duty, or malfeasance in office"[66]—appear to contemplate at least some degree of presidential supervision over the activities of independent agencies. The statutory restriction might, then, be interpreted as allowing, not forbidding, procedural requirements. To be sure, such requirements might tend to encourage agency officials to adhere to the views of the President, and to that extent compromise what the Court perceived to be their necessary independence. But it is doubtful that any such effect would be sufficiently great as to overstep the bounds of the statute itself.

Finally, the facts of *Humphrey's* were quite limited, providing the Court no occasion to speak to the permissibility of insulating law-administering officials from what we have called procedural requirements. Indeed, President Roosevelt had imposed on Humphrey no procedural or substantive constraints. The case involved a proposed discharge for reasons of trust, raising the question whether "Congress could legitimately insist that one holding the office of Federal Trade Commissioner serve on terms other than those of a personal adviser."[67]

Our conclusion that *Humphrey's Executor* should not be understood to preclude application of requirements like those in the executive orders to the "independent" agencies is based on the understanding, set forth above, that Article II creates a unitary executive. The Constitution makes no provision for a category of agencies existing "outside" the executive, legislative, and judicial branches. The President is the constitutionally specified agency of the Congress in the implementation of federal law.

This conclusion hardly resolves all of the complicated issues that

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[65]*See supra* notes 41–65, and accompanying text.
[66]Humphrey's Executor v. United States, 295 U.S. 602, 623 (1935).
[67]*See* Strauss, *supra* note 17, at 615.

might arise from congressional efforts to insulate officials from presidential supervision. It is arguable that a congressional judgment that certain functions are to be performed "apolitically" may warrant respect, at least where Congress has been equally careful about its own involvement in the agency's business. But the notice-and-comment rulemaking the executive orders seek to control is not such a setting. Consequently, the statutes governing the "independent" agencies should not be interpreted to foreclose presidential supervisory power of the sort reflected in Executive Orders 12,291 and 12,498.

From the standpoint of sound regulatory policy, fashioned in a process of informal rulemaking, we believe that there is no meaningful difference between the "independent" agencies and those agencies to which the executive orders are currently applicable. The two categories of agencies engage in regulatory activities that are, from a functional standpoint, indistinguishable. Indeed, often those activities concern the same or similar subject areas; consider the overlapping work of the Department of Justice and the Federal Trade Commission in the area of antitrust. The same considerations that justify a coordinating presidential role with respect to "executive" agencies apply with full force to those characterized as "independent." For these reasons, we believe that Executive Orders 12,291 and 12,498 should be applied to the latter set of agencies.

APPENDIX

American Bar Association
Administrative Law Section

RECOMMENDATION

Resolved,

The American Bar Association supports the following principles regarding executive oversight of federal agency rulemaking, in particular the implementation of Executive Orders 12,291 and 12,498.

1. The Constitution's choice of a unitary executive justifies presidential involvement in rulemaking activities of federal agencies. In particular, insofar as Executive Orders 12,291 and 12,498 implement the President's constitutional authority to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,"[68] those orders are appropriate exercises of presidential power.

2. The constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and the independent agencies. The executive orders should be extended to the independent agencies because of the need for presidential oversight of all administrative rulemaking activities.

3. Oversight of agency rulemaking by the executive branch, including the Office of Management and Budget (OMB), should recognize (a) the placement of substantive decisional responsibility in the agencies; (b) the principle of procedural regularity; (c) the executive's general obligation to enforce the law as it has been enacted by Congress; (d) the role of Congress in any political process for oversight of rulemaking activity; and (e) the value of opening the rulemaking process to public scrutiny and review.

4. Executive oversight should seek to shape the course of agency policymaking rather than to displace decisions in particular proceedings. The oversight process is most appropriate in (1) setting the overall priorities of government; (2) matters requiring coordination of the activities of several responsible agencies; and (3) matters of public importance involving expression of the policy views of the President. That process should include explicit and workable provisions for pres-

[68]U.S. CONST. art. II, § 2.

idential mediation of any disagreements that may arise between an agency and OMB in implementing the executive orders.

5. OMB should adopt procedures to ensure disclosure in the relevant rulemaking proceeding of any factual materials it introduces into the proceeding, and of all substantive communications with persons outside the executive branch regarding matters undertaken pursuant to Executive Orders 12,291 and 12,498.

6. While reports made to the President pursuant to his authority to demand "Opinions, in writing" should, in general, be regarded as an element of the decision process and consequently confidential, agency submissions prepared under Executive Orders 12,291 and 12,498 (and any responsive OMB documents) should, in the absence of special circumstances, be made available on request to relevant congressional committees after the rulemaking activity is complete.